

Article

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“Control” Panel

Who are the investment fiduciaries for a 401(k) plan?

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As fiduciaries, investment committee members must, either by knowledge and experience or with help from advisers, be capable of prudently selecting the investments. After all, the quality of the employees' retirement benefits—and of their standard of living after retirement—rests to a large degree on the committee members capably performing their duties.

If the committee members do not have the education and experience to handle the job, then, as one court has said: "ERISA fiduciaries are held to the standard not of a 'prudent layperson' but of a 'prudent fiduciary with experience dealing with a similar enterprise.' ... If they do not have all of the knowledge and expertise necessary to make a prudent decision, they have a duty to obtain independent advice."

Officers

In cases where the responsibility for selecting the investments is not assigned, it remains with the plan sponsor. In that case, the officers who make the investment decisions become fiduciaries. Corporate officers may be the investment fiduciaries because they are members of the plan committee, because they have been assigned investment responsibilities by virtue of their offices, or because they undertake that responsibility as functional fiduciaries.

However, officers are not automatically fiduciaries. If an officer does not perform one of those activities, he is not a fiduciary.

Directors

The board of directors typically does not select 401(k) investments. However, the board usually appoints or ratifies the plan committee or corporate officers who choose the investments. As the Department of Labor (DoL) has explained, those activities make the directors fiduciaries:

[T]he board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise "discretionary authority or discretionary control

respecting management of such plan” and are, therefore, fiduciaries with respect to the plan. However, their responsibility, and, consequently, their liability, is limited to the selection and retention of fiduciaries....

Thus, the directors' fiduciary responsibility usually is limited to the prudent selection and monitoring of the committee members or officers who serve as the investment fiduciaries. To satisfy those duties properly, directors must:

- Determine if the committee members are qualified (either on their own or with the help of internal expertise or external consultants) to make decisions about 401(k) investments;
- Monitor the performance of the committee and, if necessary, remove and replace committee members.

As one court has said:

Corporate directors who appoint fiduciaries who are untutored and inexperienced in the operations of an employee benefit plan and the investment of its assets owe a special duty to the Plan to ensure that the appointed fiduciary clearly understands his obligations, that he has at his disposal the appropriate tools to perform his duties with integrity and competence, and that he is appropriately using those tools.... In circumstances where, as here, the appointed fiduciary is given considerable discretion and is unsophisticated in employee benefit matters, especially careful monitoring by the appointing fiduciary of the appointed fiduciary's performance, and of his compliance with ERISA and plan documents, is required under ERISA.

That case demonstrates the importance of appointing committee members who have a fundamental working knowledge of investment principles and who can select and monitor competently investment advisers and other providers. It also demonstrates the risk of appointing a person to serve on a plan committee who lacks the knowledge and experience to do the job properly.

In the context of a 401(k) plan, the sponsor, through its officers, controls the investment choices given to the participants. That control is a fiduciary function. The officers who exercise the control, as well as the directors who oversee their conduct, are fiduciaries under ERISA. Recognizing fiduciary status is the first step in satisfying ERISA's requirements.

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